IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 19 OF 2006

State
Through Public Prosecutor,
High Court of Bombay at
Panaji. ... Appellant

versus

1. Digamber Azgaokar
   S/o Arjun Azgaokar
   R/o House No.324,
   Near Ganapati Temple,
   Mangor Hill,
   Vasco, Goa.

2. Nilesh Asgaokar,
   S/o Digamber Azgaokar,
   R/o House No.324,
   Mangor Hill,
   Vasco, Goa.

3. Sanjay Asgaokar,
   S/o Digamber Asgaokar,
   R/o House No.324,
   Mangor Hill,
   Vasco, Goa. ... Respondents

Ms. Winnie Coutinho, Public Prosecutor for the Appellant.

Mr. P. A. Kamat, Advocate for the Respondents.

CORAM : S. A. BOBDE &
N. A. BRITTO, JJ.

DATE : 12TH JUNE, 2007.

JUDGMENT(Per N. A. BRITTO, J.)

This is State's Appeal against the acquittal of the accused under Sections 307, 324 r/w 34 I.P.C., by Judgment dated 24-3-2005 of the learned Assistant Sessions Judge, Margao.

2. The accused were charged and tried with the allegation that on 11-10-2002 at about 23.15 hours outside D'Souza bar at Mangor Hill, Vasco-da-Gama, A-1/Digamber assaulted PW8/Abdul Samir with broken glass bottle on his neck while A-2/Nilesh and A-3/Sanjay assaulted him with kicks and fist blows and thereafter assaulted PW1/Ganesh Pillai with a glass bottle on his neck. The prosecution examined 10 witnesses in support of the charge.

3. On the other hand, it was the case of A-1/Digamber that he was not present at the scene but was on duty as a driver on that day at Verna and he was falsely implicated. The case of A-2/Nilesh and A-3/Sanjay was that they were at home and were falsely implicated. A-1/Digamber examined himself in support of his plea of alibi and also examined his employer namely, DW1/Baban Parmekar who at the relevant time was running his bus on contract basis for Paintair Water India Pvt. Ltd. and whose bus would depart at 11 p.m. from Sada to take workers to Verna Industrial Estate at Verna.

4. We have heard Ms. Winnie Coutinho, the learned Public Prosecutor in support of the appeal and Mr. P. A. Kamat, the learned Counsel on

behalf of the accused.

5. The learned Assistant Sessions Judge in acquitting the accused has doubted that PW3/Ramesh and PW9/Ablu were present at the scene of offence and had witnessed the incident and has otherwise found that the evidence of PW1/Ganesh and PW8/Abdul Samir was unreliable and therefore has proceeded to acquit the accused, as aforesaid.

6. There is no dispute that A-1/Digamber is a driver by profession and is the father of A-2/Nilesh and A-3/Sanjay. PW1/Ganesh Pillai and PW8/Abdul Samir are both painters, friends and neighbours and were working at the same place. PW1/Ganesh, PW8/Abdul Samir as well as the accused were also neighbours, and, the brother of PW1/Ganesh, by name Raj Kumar Pillai had enmity with the accused at the relevant time and probably for this reason the learned Assistant Sessions Judge has scrutinized the prosecution evidence closely and in our view rightly, and rejected the same as unreliable.

7. After the incident, PW1/Ganesh was examined by PW6/Dr. Nadkarni at the Cottage Hospital at Chicalim and he found on PW1/Ganesh Pillai a haematoma of 3 x 3 cms. on mid frontal area of the skull which was stated to have been caused by a hit of a bottle. As per PW6/Dr. Nadkarni, PW1/Ganesh Pillai was examined with history of bleeding from the nose but there was no nasal bleeding. As stated by him, PW1/Ganesh Pillai was examined with history of alcohol consumption. PW8/Abdul Samir was examined

by Dr. Bhobe in the Department of Surgery of Goa Medical College who found on him a CLW on the right forearm, a penetrating injury on the left side of the neck with profuse bleeding, an abrasion on the left upper eye lid, another abrasion on the left zygomatic area and a CLW on the anterior abdominal wall muscle deep, which injuries in the opinion of Dr. Bhobe, were simple in nature.

8. As per the version given by PW8/Abdul Samir, he and PW1/Ganesh Pillai were returning from work, together and they were walking at a distance of about one meter from each other. According to him, when they reached near D'Souza bar A3-/Sanjay asked him whether he was going about with Raj Kumar Pillai and whether he had become a “dada” and then gave a blow towards the right side of his face and he pushed A-3/Sanjay but his father namely, A-1/Digamber intervened and removed one bottle and attempted to hit it on him towards his right wrist and thereafter he broke the bottle by dashing on the ground and assaulted him by hitting the same on his stomach and when he tried to get up, A-1/Digamber stabbed him with the help of the broken bottle on the left side of his neck on account of which he sustained bleeding injuries on his neck and on his stomach and he fell down semi unconscious bleeding profusely and when he fell down PW1/Ganesh came nearby, to save him but, he was assaulted by A-3/Sanjay with the bottle. He stated that first he was taken to Chicalim Hospital and thereafter to Goa Medical College. However, PW1/Ganesh has not at all supported the version given by PW8/Abdul Samir. As per PW1/Ganesh, he saw A-1/Digamber assaulting PW8/Abdul Samir with a bottle and the other two accused were holding the said PW8/Abdul Samir and at

that time he questioned the accused as to why they were assaulting PW8/Abdul Samir at which he was assaulted by A-3/Sanjay with a bottle and by A-2/Nilesh with a blow on his nose. In fact, the version given by PW1/Ganesh that he saw A-2/Nilesh and A-3/Sanjay holding PW8/Samir and A-1/Digamber assaulting PW8/Samir is a version which was not given by him to the Police and he was confronted with the same and was unable to give any explanation, much less a satisfactory explanation to such an omission. The cross-examination of PW1/Ganesh shows that he was not coming along with PW8/Abdul, as stated by the latter, but was in the bar for about 5 minutes. That he was in the bar is also confirmed by PW6/Dr. Nadkarni who found PW1/Ganesh with history of alcohol consumption and it is quite probable that PW1/Ganesh reached the scene much later or was not at all present when the assault on PW8/Abdul took place and for that reason the version given by PW1/Ganesh materially differs from the version given by PW8/Abdul Samir.

9. PW3/Ramesh gave yet another version regarding the incident. According to him, it is A-2/Nilesh and A-3/Sanjay who were assaulting PW8/Abdul Samir and it is A-1/Digamber who came with a broken bottle and assaulted him on his stomach. He further stated that PW1/Ganesh tried to separate the accused, which is not the case of PW1/Ganesh himself and that the said PW1/Ganesh was assaulted by A-3/Sanjay who gave a blow on the nose of PW1/Ganesh and A-2/Nilesh who gave a fist on his stomach. According to him, A-3/Sanjay assaulted PW1/Ganesh with a bottle and the latter as well as PW8/Abdul Samir fell down on the ground, which is again not the version given

by PW1/Ganesh himself, that he ever fell down. PW9/Ablu added yet another version to the case of the prosecution. According to him, he saw all the accused assaulting PW8/Abdul Samir with fist blows and thereafter A-1/Digamber broke one glass bottle and assaulted PW8/Samir on his stomach and neck who sustained bleeding injuries. PW9/Ablu confirms the fact that PW1/Ganesh Pillai reached the scene after the assault on PW8/Abdul and further stated that he was assaulted by all the three accused. As per him, it is A-1/Digamber who assaulted PW1/Ganesh with a glass bottle and not A-3/Sanjay as stated by PW1/Ganesh himself. In cross-examination, PW9/Ablu has stated that he was alone when the incident took place and this statement of his creates a doubt regarding the presence of PW1/Ganesh and PW3/Ramesh at the time of incident. Although, the injuries sustained by PW8/Abdul were substantially proved by the medical evidence of PW5/Dr. Bhobe, it is interesting to note that PW8/Abdul did not state to his wife PW2/Smt. Sahin Samir, who is stated to have reached the scene of offence, as to who had assaulted him and her evidence confirms that nobody was around at that place except her husband the said PW8/Abdul. As rightly observed by the learned Assistant Sessions Judge, PW8/Abdul would have certainly reported to his wife as to who had assaulted him.

10. Considering the inconsistent and contradictory versions given by PW1/Ganesh, PW3/Ramesh and PW9/Ablu, the case of the prosecution could not have been accepted as free from doubt. The view held by the learned Assistant Sessions Judge on the basis of the evidence adduced by the

prosecution is quite a possible view which calls for no interference from this Court. The accused therefore were entitled to be given benefit of doubt.

11. There is another aspect to be taken note of. The learned Assistant Sessions Judge has observed, and in our view rightly that A-1/Digamber had taken the plea of alibi right from the beginning, but has concluded that he was unable to establish the said plea of alibi with certainty. DW2/Digamber i.e. A-1/Digamber in his evidence had stated that he was driving the bus and had left Sada at about 10.45 p.m. and had reached Verna at about 11.50 p.m. where he waited till about 12.50 p.m. to collect the workers from the factory. DW1/Baban Parmekar had confirmed that he was running a bus bearing No. GA-01-T-5026 for Paintair Water India Pvt. Ltd. and the accused no.1 was his driver as on 11-10-2002. As per him, the accused had to leave from Sada, for the third shift at 11 p.m. with the staff of Paintair Water India Pvt. Ltd. Although, A-1/Digamber and DW1/Baban Parmekar were not able to produce the register wherein the driver of the bus had to sign on reaching the factory as an acknowledgment, nevertheless, the fact remains that the defence was able to secure an admission from the Investigation Officer, in his cross-examination, to the effect that at the time of the offence, he knew that A-1/Digamber was driving the bus of the said Company which in our view coupled with other evidence, was sufficient to give benefit of doubt to A-1/Digamber that he was not present at the time of incident. No doubt, the Apex Court in **State of Maharashtra** v. **Narsingrao Gangaram Pimple**(AIR 1984 SC 63) has stated that it is well settled that a plea of alibi must be proved with absolute certainty so as to

completely exclude the possibility of the presence of the person concerned at the place of occurrence. Nevertheless, in the case of **Chandrika Prasad Singh and others** v. **The State of Bihar**(AIR 1972 SC 109) the Apex Court, speaking through another three Judges has stated that the onus to establish alibi is on the accused. It is well settled that the standard of proof necessary for an accused to prove a plea taken by him is not of the degree that is required of the prosecution to establish a crime beyond a reasonable doubt but such a plea can be proved by placing material before the Court sufficient to make it consider the existence of circumstances so probable that a prudent man would act upon them; in other words, the accused has only to satisfy the standard of a prudent man, and he need not establish his plea beyond reasonable doubt, to put it still differently, the burden of proof upon the accused is no higher than that of a party to civil proceedings, that is, a preponderance of probability alone is sufficient. Considering that, A-1/Digamber independently, deserved to be given benefit of doubt.

12. In view of the above, we find there is no substance in this appeal and consequently the same is hereby dismissed.

S. A. BOBDE, J.

N. A. BRITTO, J.

RDs